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In The

Supreme Court of the United States

October Term 2007

ALICIA REEVES and ASHLEE REEVES,

Petitioners,

vs.

ALEX CHURCHICH, KEVIN JONES, DAVID WIERMANN, C. HOUSLEY,

Respondents.

Petition for Writ of Certiorari to the Tenth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a police officer violate the Fourth Amendment rights of a 14 year-old girl and her mother when, acting without warrant or exigent circumstances, he inserts a loaded rifle through an open window of their home and into a bedroom where the girl, attempting to dress, is naked; and then aims the rifle at her, orders her to get on the floor, and she then runs from the bedroom?

2. Does insertion of a rifle into a private home by a police officer, acting without a warrant or exigent circumstances, constitute an unlawful entry (a.k.a. unreasonable search) in violation of the Fourth Amendment?

3. Do officers seize non-suspects within the meaning of the Fourth Amendment when they threaten them with loaded firearms?

4. Can police officers' actions be considered objectively reasonable when, acting without warrant or exigent circumstances, they threaten individuals they know are non-suspects in and about their home with loaded firearms?

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OPINIONS BELOW

This matter was appealed to the United States Court of Appeals for the Tenth Circuit, which issued a decision on April 24, 2007. *See* Appendix A, *Reeves v. Churchich*, 484 F.3d 1244 (10th Cir. 2007). The matter was originally determined by the district court on summary judgment motions asserting qualified immunity. *See* Appendix B, *Reeves v. Churchich*, 331 F.Supp.2d 1347 (D.Utah 2004).

BASIS FOR JURISDICTION

The judgment of the Tenth Circuit was entered April 24, 2007. This Petition for Certiorari is filed within 90 days of entry of that judgment.

Jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV to the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On June 21, 2000, Detective Alex Churchich of the Salt Lake County Sheriff's Office, acting without a warrant or exigent circumstances, inserted the barrel of his rifle through an open window and into a bedroom where fourteen year-old Ashlee Reeves, was attempting to dress.[1] Ashlee was naked, having just showed. *Id.* R 536-37, 470-71, 206. Detective Churchich aimed the rifle at Ashlee and kept it on her when she moved within the bedroom. R 537, 469, 474, 530.

At the time of Detective Churchich's conduct, he had called an "agency assist" into the Salt Lake City Police Department ("SLCPD") to look for an adult male, domestic-violence suspect. R 248. Churchich had received a tip that the suspect might be in the home of Tim and Sharon Bell, who lived in the upper level residence of a duplex. R 204-05, 248. The ground or lower level of the duplex was a separate address, occupied by Ashlee and her mother, Alicia Reeves, who had no relation to the Bells or the suspect. R 201. One main door in the front of the duplex opened onto two sets of stairs, one up to the Bells' door and one down to the Reeves' door. R 204-06, 253, 260.

Several SLCPD officers, including the other-named Respondents, responded to Detective

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[1]Detective Churchich's conduct in this regard was seen by an independent witness observing from outside the Reeves' residence. R 529-30.

Churchich call and he informed them that the suspect was an adult male. R 314, 413. Detective Churchich supervised the action to look for the suspect at the Bell residence. R 275, 287-88, 309, 317-18 , 373, 387. Again, he had no warrant nor did any of the officers assisting him. R 249. His plan was to send officers to the Bells' door to ask for the suspect. R 249.

Prior to going to the duplex, Churchich was made aware that the Bells lived in the duplex's upper residence and that the lower level constituted a separate residence. R 250-51. However, he did not tell the assisting officers from the SLCPD either the location of the Bell residence within the duplex or that the ground level constituted a separate home. R 251. He also did nothing to notify, warn, or otherwise protect Alicia and Ashlee Reeves from the impending action.

At the duplex, Detective Churchich took up a containment[2] position on the southwest, front corner of the duplex and Respondent Wierman was positioned for containment at the back of the duplex. R 251, 253, 260, 318-19, 530. It was at this southwest corner containment position that Churchich inserted his rifle into the Reeves' home, which he knew was not the residence of the suspect, and he trained his muzzle on Ashlee, whom he knew was not a suspect.

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[2]Respondents testified that on containment, officers are positioned so as to catch a suspect fleeing from an edifice, but are to stay away from windows since they pose a danger, and they are not to try to apprehend a suspect through a window. R 251,283, 386-87, 431, 434, 436.

Before being assaulted by Churchich, Ashlee Reeves had been in her own bedroom at the back of the duplex, trying to dress. R 536-37. There, Respondent Wierman had also pointed his rifle at Ashlee and said, "Police, don't move." R 337-38, 343, 536-37. Shocked that an adult man was looking into her back bedroom window while she was naked and commanding her not to move, Ashlee ran to the living room, where she frantically woke up her mother, Alicia, who was sleeping on the couch. R 536-37, 206.

Semi-conscious and observing Ashlee just in a towel, Alicia told her to go dress in her (Alicia's) bedroom. R 206. There, the bedroom window was open, but the view was blocked by foliage. R 537. While attempting to dress again, Ashlee realized that the muzzle of Detective Churchich's rifle was pointed at her and it followed her when she moved in the room. R 537, 469, 474, 530. Detective Churchich then said, " Get down on the floor." R 537, 469, 474, 530, 251, 245, 214, 388, 323, 325, 253. Ashlee ran back to the living room, screaming about this second assault. R 206, 226.

Now fully awake, and upset by Ashlee's reports, Alicia determined to find out who was molesting her daughter and to put a stop to it. R 207. She left her residence and went to the main door of the duplex. As she opened the door, Respondent Officer Jones put a pistol to her head and said, "Hold it right there." R 530, 207, 216. Alicia stopped, and seeing the gun, pushed it from her head, saying, "Don't point that gun at me. What's the problem? What's going on?" *Id.*

Without giving any explanation to Alicia, Officer Jones told her to go back down to her residence. R 279, 534. Alicia then heard her daughter scream and ran back inside her home to see officers outside her windows. R 207, 211.

Alicia attempted again to go tell the officers that they had the wrong home and to stop assaulting and menacing her daughter. R 207, 211. When she went out her door, she saw several officers on the stairs leading up to the Bell residence, and saw Detective Churchich on the landing, holding a rifle and blocking the exit of the duplex with the door shut behind him. R 211, 210, 540, 530. Looking up, Alicia witnessed officers pulling her neighbor, Sharon Bell, out of her home, that they grabbed her by the back of the shirt, were yanking her around by her shirt, and threw her face down on the ground. R 210, 207. Sharon Bell was in poor health, on oxygen, and she was screaming and crying, telling the officers they were hurting her. R 209-10, 390.

Greatly disturbed by the whole series of events, feeling strongly that the officers had violated and were violating their rights, and never having received any response to her request for an explanation, Alicia yelled at the officers to quit hurting Sharon Bell and demanded to know if they had a warrant. R 210, 209, 207, 223. Detective Churchich then brought the muzzle of his rifle to bear on Alicia and said, "Get back in your home." 207, 210, 541.

Respondents then proceeded into the home of Tim and Sharon Bell without a warrant and without their consent. R 210, 281-82, 541. Officer Bruno,

who entered with Respondents, knew it was wrong for the officers to enter the Bell home without a warrant. R 285. Respondents settled a lawsuit brought by the Bells for civil rights violations. R 541.

During the Respondents' action at her duplex, Alicia attempted to go outside to find out who was going around her windows and assaulting her daughter, but was prevented from ever leaving the duplex. R 213. Alicia testified that she wanted to get her daughter and herself out of the duplex, since she believed that would be safer than being inside; however, she did not believe she was free to take her daughter and leave the duplex, because of the officers' conduct and commands. R 534, 212, 208.

Petitioners commenced the suit at bar, asserting causes of action pursuant to 42 U.S.C. § 1983, for unreasonable search and seizures in violation of their Fourth Amendment rights and for supervisory liability against Churchich.

The district court granted Respondents' motions for summary judgment on qualified immunity, finding their conduct objectively reasonable. The district court also dismissed Petitioners' claim of supervisory liability against Respondent Churchich, finding there could be no supervisor liability as all Respondents were entitled to qualified immunity.

On appeal, the Tenth Circuit affirmed the summary judgment, holding that under *California v. Hodari D.* 499 U.S. 621 (1991), the Reeves Fourth Amendment rights against unreasonable seizure had not been violated because they had not submitted to

Respondents' various assertions of authority with firearms. *Reeves*, 484 F.3d at 1253. The Tenth Circuit also held that there was no seizure of the Reeves from Respondents' overall conduct, since Alicia Reeves left her residence, even though she was not allowed to leave the duplex. *Id.* At 1259-60.

Citing several Supreme Court cases, the Tenth Circuit held that no unreasonable search (a.k.a. unlawful entry) had occurred when Detective Churchich inserted his rifle into the Reeves home, since the rifle did not convey any information to Churchich. *See Id.* At 1253-58.

The Tenth Circuit also stated that even had there been a seizure of Petitioners, any such seizure was objectively reasonable. *Id.* At 1260. Finally, the Tenth Circuit concluded there could be no supervisory liability since there was no violation of the Reeves' constitutional rights. *Id.* At 1261-62.

REASONS FOR GRANTING THE WRIT

The case at bar calls for clarification by the Supreme Court of its prior Fourth Amendment interpretations, or calls for the Court to construct a new analytical framework that will give meaning to the Fourth Amendment in cases such as the one at bar. Such an opinion would provide important guidance to officers in carrying out police actions and protect the constitutional rights and safety of innocent citizens.

A. Seizure of Petitioners

The Tenth Circuit based its determination that Respondents had not violated Plaintiffs' Fourth Amendment rights on various Supreme Court holdings. Regarding Petitioners' claims of Fourth Amendment seizure, the Tenth Circuit relied on *California v. Hodari D.*, 499 U.S. 621 (1991) to conclude that no seizure of Petitioners occurred:

> Under *Hodari D.* and its progeny, the Reeves' failure to submit to Churchich, Jones and Wierman's assertions of authority precludes a finding that they were seized by these actions. At most, these officers attempted to seize the Reeves, which is insufficient. *Hodari D.*, 499 U.S. at 626 n.2.

Reeves 484 at 1253.

At issue in *Hodari D.*, was whether a suspect had been "seized" by police at the time he tossed crack cocaine from his person while an officer was giving chase. *Hodari D.* at 624. The Court stated that the Fourth Amendment did not apply to an officer's command to a fleeing suspect to stop, when the suspect ignored the officer and continued to flee. *Id.*

To conform to *Hodari D.*, the Tenth Circuit, in effect, categorized the Reeves as fleeing suspects, when their response to the Respondents' assaults actually reflects a natural reaction to violation of privacy and liberty rights. Rather than ignore police, Ashlee Reeves was forced to retreat from the privacy

of two bedrooms to cover her nakedness and get out of harm's way. Being assaulted by officers while in her own home and being deprived of her privacy and liberty rights should certainly qualify as Fourth Amendment seizure. To hold otherwise cheapens the Fourth Amendment.

Alicia Reeves also reacted naturally, and as any of us reasonably may have reacted, to the attack on her and her daughter's Fourth Amendment rights. As a responsible mother, she went to find out what was going on and to put a stop to it. However, she never even had the chance, as she was then herself assaulted twice, given no explanation as to why officers were assaulting her daughter in her home, and given no answer as to whether Respondents had a warrant. She then watched her disabled neighbor undergo a battery by the Respondents.

Ironically, to fit Alicia into the *Hodari D.* analysis, the Tenth circuit paints her as the culprit in the confrontations with Respondents:

> Alicia repeatedly interfered with the task at hand. . . . . Indeed, "this case presents the classic situation in which a plaintiff's own actions in reaction to a legitimate law enforcement encounter result in escalating volatility and danger justifying the subsequent actions of the law enforcement officers involved."

Reeves 484 at F.3d at 1261. To the contrary, this was not a legitimate law enforcement encounter and Alicia did nothing wrong. Churchich and the other

Respondents had no warrant. Alicia and Ashlee were minding their own business within the walls of their own home. Detective Churchich knew they were not suspects, nor even in the home where he was told he might find a suspect. He did nothing to warn, notify, or protect them from his impending action. Instead, he treated them as criminals, knowingly inserting his rifle into the Reeves' home and at a naked fourteen year-old girl, who had just been assaulted by another officer (whom Churchich had failed to inform about the separate residences).

The facts in the case at bar should be addressed by the Supreme Court, since the rubric for seizure articulated in *Hodari D.* does not give effect to the Fourth Amendment when applied to non-suspect citizens, such as Petitioners. Common sense dictates that the Reeves constitutional rights were violated. The plain meaning of the Fourth Amendment is to protect citizens, particularly within their own homes, from arbitrary, cavalier, and dangerous actions undertaken by law enforcement. The Reeves were subjected to such actions. Without any warrant or justification, Respondents repeatedly assaulted them inside and then outside their home.

To give proper meaning to the Fourth Amendment, the court should formulate an analysis which takes into account important factors deemed irrelevant by the Tenth Circuit. These include that the Reeves were in their own home, that they had done nothing wrong, that Respondents had no warrant and there were no exigent circumstances, that Ashlee Reeves was a minor and Alicia Reeves her mother,

and that Ashlee was assaulted while naked in her and her mother's bedrooms.

B. Unlawful Entry

The Petition for Writ should also be granted to correct a precedent set by the Tenth Circuit that allows officers, acting without a warrant or exigent circumstances, to insert loaded firearms into private homes. *Reeves* 484 at 1253-58.

In holding that insertion of Detective Churchich's rifle into the Reeves' home did not constitute an unlawful entry, the Tenth Circuit admitted it was cutting new ground since it had "unearthed no cases directly on point." *Id.* At 1255. The court analogized from various Supreme Court opinions to conclude the Fourth Amendment does not bar such conduct. *Id.* at 1256-58. In so concluding, the Tenth Circuit ignored the plain meaning and purpose of the Fourth Amendment.

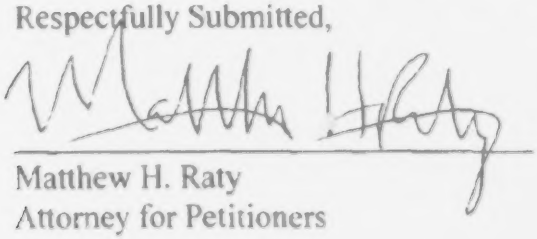
C. Objectively Unreasonable

As noted above, the Tenth Circuit also held that even if Petitioners constitutional rights were violated, the Respondents were entitled to qualified immunity because their conduct was objectively reasonable. *Reeves* at 484 at 1260-61. This holding is contrary to and undermines the Supreme Court's previous pronouncements that warrantless searches and seizures within a home are *per se* unreasonable. *See e.g. Coolidge v. New Hampshire*, 403 U.S. 443, 474-475 (1971) ("a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable,

unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances'"); *United States v. United States District Court*, 407 U.S. 297, 313 (1972) ("physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976) ("the sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection").

WHEREFORE, Petitioners respectfully request that the Court grant their Petition for Writ of Certiorari.

Respectfully Submitted,



Matthew H. Raty
Attorney for Petitioners

APPENDICES

[APPENDIX A]

Reeves v. Churchich, 484 F.3d 1244 (10th Cir. 04/24/2007)

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

No. 04-4240

484 F.3d 1244, 2007.C10.0000619<
http://www.versuslaw.com>

April 24, 2007

ALICIA REEVES; ASHLEE REEVES, PLAINTIFFS-APPELLANTS,
v.
ALEX CHURCHICH; KEVIN JONES; DAVID WIERMAN; C. HOUSLEY, DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the District of Utah (D.C. No. 2:02-CV-551-DAK).

Matthew H. Raty, Law Office of Matthew H. Raty, P.C., Salt Lake City, Utah, for Plaintiffs-Appellants.

Nicolas M. D'Alesandro, Deputy District Attorney for Salt Lake County, Utah (David E. Yocom, District Attorney for Salt Lake County, and T.J. Tsakalos, Deputy District Attorney, on the briefs), Salt Lake City, Utah, for DefendantAppellee Churchich.

J. Wesley Robinson, Senior City Attorney, Salt Lake City, Utah, for DefendantsAppellees Jones, Wierman and Housley.

The opinion of the court was delivered by: O'brien, Circuit Judge

PUBLISH

Before MURPHY, SEYMOUR and O'BRIEN, Circuit Judges.

On June 21, 2000, Detective Alex Churchich of the Salt Lake County Sheriff's Office attempted, with the assistance of Officers Kevin Jones, David Wierman and Christie Housley of the Salt Lake City Police Department (The Officers), to apprehend a domestic violence suspect believed to be staying in an upstairs apartment of a duplex. In doing so, they allegedly pointed their weapons at Plaintiffs Alicia and Ashlee Reeves, who resided in the downstairs apartment of the duplex, and prevented them from leaving. The Reeves claim these actions violated their Fourth Amendment right to be free from unreasonable searches and seizures. Detective Churchich and The Officers moved for summary judgment based on qualified immunity. The district court granted their motions, concluding the Reeves had failed to demonstrate a violation of their constitutional rights. The Reeves appeal. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

I. Background

In June 2000, Alicia Reeves and her daughter Ashlee (then fourteen years old) resided in the downstairs apartment of a duplex in Salt Lake City, Utah. Tim and Sharon Bell lived upstairs. The front of the duplex, which contained the duplex's only entry, faced west. The front entrance consisted of a screen door and a regular door, neither of which were

capable of being locked. Immediately inside the front entrance was a small landing, with stairs leading up to the Bells' apartment and down to the Reeves' residence.

On the afternoon of June 21, 2000, Detective Alex Churchich of the Salt Lake County Sheriff's Office learned from a witness that Charles Diviney, who was suspected of assaulting his estranged wife, was staying with his sister, Sharon Bell. The witness also told Churchich that Diviney was leaving town and had access to firearms. Based on this information, Churchich decided to attempt to apprehend Diviney at the Bell residence.

Before proceeding to the Bell residence, Detective Churchich contacted the Salt Lake City Police Department for assistance (i.e., an agency assist).*fn1 The department dispatched Officers Kevin Jones, David Wierman, Cary Wichmann, Ron Bruno, Christie Housley and Alton Hedenstrom. These officers met Churchich in an abandoned lot near the Bell residence.*fn2 There, Churchich advised them of the situation and informed them that although he did not have a warrant for Diviney, he had probable cause to arrest him for assault. His intent was to perform a "knock and talk" at the Bell residence - approach the Bell residence and seek permission to search it for Diviney. Churchich also warned The Officers that Diviney was possibly armed.

After some discussion, Churchich and The Officers decided Jones, Bruno and Housley would attempt entry into the Bell residence while Churchich, Wierman, Wichmann and Hedenstrom performed containment duties outside the duplex.*fn3 Thereafter, Churchich and The Officers proceeded to the Bell residence, approaching it from the south.*fn4 Once at the residence, Churchich, armed with a

rifle and handgun, stationed himself at the southwest corner of the duplex. Wierman, who was also armed with a rifle and handgun, and Wichmann, armed with a handgun, proceeded to the northeast corner of the duplex. Hedenstrom waited in the lot until the other officers arrived at the Bell residence. He then drove his patrol car to the residence and parked it behind a truck believed to belong to Diviney, to prevent it from leaving. Hedenstrom then proceeded to the northeast corner of the duplex to perform containment behind Officers Wierman and Wichmann. The remaining officers, Jones, Bruno and Housley, entered the duplex with their handguns drawn.*fn5

The Reeves were in their apartment. Alicia was on the living room couch starting to take a nap. Ashlee was taking a shower. When she finished, Ashlee went into her bedroom to get dressed. Through her opened but barred window,*fn6 she observed individuals she believed to be police officers walking with guns at their side. She then heard one of the individuals, allegedly Officer Wierman, say "Hold it right there." (R. Vol. II at 470.) She immediately grabbed her towel (she was still naked) and ran into the living room.*fn7 Ashlee woke Alicia, telling her there were people with guns in the backyard. Alicia, still half asleep and groggy, told Ashlee to go to Alicia's bedroom and get dressed while she determined what was going on.

While in her mother's bedroom, Ashlee observed a rifle barrel, alleged to be Detective Churchich's, through the open but barred window. The barrel was "moving around," following her movement. (R. Vol. II at 469.) Ashlee then heard someone say "Get down on the ground." (Id.) In response, Ashlee reached up, closed the blinds and ran out of the room to find her mother.*fn8

The dog was barking and would not go out the front door. Alicia decided to take her dog outside. When she reached the duplex's front entrance, she bent forward to pick up her dog. When she stood up, she met Officer Jones, who had just turned around, with his gun pointing at her head.*fn9 In shock, Alicia pushed the gun away and said "Don't point that gun at me. What's the problem? What's going on?" (R. Vol. I at 207.) She then heard Ashlee scream and ran downstairs to investigate.

Once downstairs, Alicia could see police officers circling her apartment. Scared, she told Ashlee to lie down behind the couch. Ashlee complied and Alicia went back upstairs. She again met Officer Jones and asked him to explain what the officers were doing. After receiving no answers, she went downstairs to her apartment to check on Ashlee.

While there, Alicia heard commotion upstairs. She went outside her door and saw officers pulling Sharon Bell out of the Bell residence.*fn10 Alicia asked what was going on. Officer Housley told her it was none of her business and to go back inside her apartment. Alicia responded, "It is my business. You are in my apartment. You are in my home. You are . . . invading me. You need to tell me what's going on." (R. Vol. I at 209.) Housley replied, "Get back in your apartment, bitch[.]" (Id.) Alicia responded, "I am not leaving.*fn11 I want to know what's going on." (Id. at 211.)

Alicia then began yelling - asking The Officers whether they had a warrant, what was going on and would somebody please talk to her. By that time, Churchich had been called from his containment position to the Bell residence. While standing on the landing inside the duplex's

main entrance, Churchich lifted his rifle (which had been pointing at the ground at his side) about three feet and told Alicia to get back in her apartment. Because Alicia was standing below him, when Churchich lifted his rifle, it was pointed at her.*fn12 She refused to go back inside her apartment and remained outside until Churchich, The Officers and Sharon Bell went inside the Bell residence. At that time, Alicia went to check on Ashlee.

After checking on Ashlee, Alicia again left her apartment. At the landing, she was met by Officer Jones, who asked her questions for his report. After talking with him for a few minutes, she returned to her apartment.

Upon learning that Diviney was not at the Bell residence, Churchich and The Officers left the scene. Diviney was later apprehended by the Las Vegas Police Department.

On June 6, 2002, the Reeves filed a civil rights complaint against Churchich, Jones, Wierman, and Housley alleging violations of a Fourth Amendment right to be free from unlawful searches and seizures.*fn13 The Reeves also claimed Churchich, as The Officers' supervisor, was liable for their allegedly unconstitutional actions.*fn14 In M arch and May 2004, Churchich and The Officers filed motions for summary judgment asserting qualified immunity. On September 2, 2004, the district court granted both motions. Judgment was entered five days later. This timely appeal followed.

II. Discussion

The Reeves claim the district court erred in granting summary judgment on the qualified immunity and supervisor liability claims.

A. Qualified Immunity

We review a grant of summary judgment based on qualified immunity de novo, applying the same legal standard used by the district court. Lawmaster v. Ward, 125 F.3d 1341, 1346 (10th Cir. 1997). Summary judgment should be granted "if the pleadings . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). In conducting our review, "[w]e view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." Lawmaster, 125 F.3d at 1346.

"In an action under section 1983, individual defendants are entitled to qualified immunity unless it is demonstrated that their alleged conduct violated clearly established constitutional rights of which a reasonable person in their positions would have known." Murrell v. Sch. Dist. No. 1, Denver, Colo., 186 F.3d 1238, 1251 (10th Cir. 1999). Once a defendant has raised qualified immunity as an affirmative defense, the plaintiff bears the heavy two-part burden of demonstrating that (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established at the time of the alleged conduct. Reynolds v. Powell, 370 F.3d 1028, 1030 (10th Cir. 2004). Our inquiry must be conducted in that order; in other words, we must first address whether the alleged facts demonstrate the defendant's conduct violated a constitutional right. Saucier v. Katz, 533 U.S. 194, 201 (2001). If the court concludes no constitutional

right has been violated, no further inquiry is necessary and the defendant is entitled to qualified immunity. Id.

1. Violation of Constitutional Right

In this case, the district court found Churchich and The Officers were entitled to qualified immunity because the Reeves had failed to show they violated a constitutional right. Specifically, the court concluded that even assuming a search or seizure occurred under the Fourth Amendment, the conduct was objectively reasonable under the totality of the circumstances.

The Reeves challenge this ruling, arguing they demonstrated Churchich and The Officers violated their Fourth Amendment right to be free from unreasonable searches and seizures. Specifically, they claim they were unlawfully seized when (1) Wierman pointed his rifle at Ashlee and ordered her not to move,*fn15 (2) Churchich pointed his rifle at Ashlee and ordered her to get down on the ground, (3) Jones pointed his handgun at Alicia's head,*fn16 and (4) Churchich pointed his rifle at Alicia and told her to return to her apartment. They also assert Churchich's insertion of his rifle into the interior of Alicia's bedroom constituted an unreasonable search. More generally, the Reeves assert the overall conduct towards them, i.e., weapons repeatedly pointed at them, ordering them not to leave their apartment and the tone and harshness of their commands, conveyed to them they were not free to ignore Churchich and The Officers' presence and go about their business and thus constituted an unlawful seizure of their persons within the meaning of the Fourth Amendment.

We begin with the Reeves' specific arguments.

a. Whether Churchich, Jones and Wierman Unlawfully Seized the Reeves by Pointing their Weapons at them and Making Verbal Commands

The Reeves claim they were unlawfully seized when Wierman pointed his rifle at Ashlee and ordered her not to move, Churchich pointed his rifle at Ashlee and ordered her to the ground, Jones pointed his handgun at Alicia's head and Churchich pointed his rifle at Alicia and told her to return to her apartment. Churchich and The Officers argue no seizure occurred because the Reeves failed to submit to these assertions of authority. We agree.

The Fourth Amendment prohibits unreasonable seizures of an individual's person by law enforcement. U.S. CONST. amend. IV. However, "not all personal intercourse between policemen and citizens involves 'seizures' of persons." Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Id.

In California v. Hodari D., the Court expounded on the "show of authority" requirement for a seizure. 499 U.S. 621 (1991). There, Hodari tossed crack cocaine from his person while engaged in a foot chase with the police. The issue was whether he had been "seized" by the police at the time he discarded the drugs. Because he had not been physically touched by the police at the time he tossed the drugs, Hodari relied on the "show of authority" language from Terry. Specifically, he claimed that because the police pursuit qualified as a "show of authority" calling upon him to halt, he was seized. The Court disagreed, holding a police officer's assertion of authority does not constitute a seizure

unless the person actually submits. Id. at 626. Thus, because Hodari did not stop in response to the police pursuit, no seizure occurred. Id. at 629.

We applied Hodari in United States v. Harris, 313 F.3d 1228 (10th Cir. 2002). There, a police officer approached Harris asking him for his identification. Harris ignored the officer and continued walking. The police officer again asked Harris for identification; he again ignored the request and walked past the officer. Harris then placed his hands in his pockets and began walking backwards facing the police officer. Fearing Harris was concealing a weapon, the police officer asked him to remove his hands from his pockets. When Harris refused, the officer removed them for him and escorted Harris to the police car. On appeal, Harris argued the police officer seized him when the officer began asking for identification. We disagreed:

> [Harris] ignored [the officer] and continued walking both times that [the officer] requested his identification. Therefore, even if [the officer's] requests for identification could be construed as an "assertion of authority," [Harris] did not submit to it. Accordingly, [Harris] was not seized for purposes of the Fourth Amendment until [the officer] implemented physical force by removing [Harris'] hands from his pockets and escorting him to the police car.
>
> Id. at 1235.

Similarly, in Bella v. Chamberlain, the plaintiff, while piloting his helicopter, was taken hostage at gunpoint and required to assist in the escape of several inmates from prison. 24 F.3d 1251 (10th Cir. 1994). During law enforcement's attempt to capture the escaped inmates, an

officer fired three rounds at the fleeing helicopter, one of which hit the aircraft. Despite his helicopter being hit, the plaintiff continued to flee. The plaintiff brought suit against the police officer, arguing, inter alia, that the officer used excessive force in violation of the Fourth Amendment. Relying on Hodari D., we concluded no seizure occurred. Although we found the police officer's firing of his gun constituted an assertion of authority, we concluded no seizure occurred because the shots "did not cause [the plaintiff] to submit nor did they otherwise succeed in stopping him." Id. at 1256 (footnote omitted); see also Latta v. Keryte, 118 F.3d 693, 700 (10th Cir. 1997) (holding unsuccessful pursuit of the defendant on interstate not a seizure; "[w]hile the pursuit constituted an assertion of authority, the pursuit did not cause Mr. Latta to submit to the authority or succeed in stopping him").

In this case, Churchich, Jones and Wierman did not physically touch either Ashlee or Alicia.*fn17 However, they clearly asserted their police authority by pointing their weapons and making verbal commands. Nevertheless, in each situation, neither Ashlee nor Alicia submitted to these assertions of authority. When Wierman pointed his rifle at Ashlee and ordered her not to move, she ran out of the room. In response to Churchich pointing his rifle at her and ordering her to get on the ground, Ashlee closed the blinds on the window and ran out of the room. When Jones pointed his handgun at her head, Alicia pushed the gun away. In response to Churchich pointing his rifle at her and ordering her to return to her apartment, Alicia remained standing outside her apartment. Under Hodari D. and its progeny, the Reeves' failure to submit to Churchich, Jones and Wierman's assertions of authority precludes a finding that they were seized by these actions. At most, these officers attempted to

seize the Reeves, which is insufficient. Hodari D., 499 U.S. at 626 n.2.

The Reeves do not dispute that they did not submit to Churchich, Jones and Wierman's assertions of authority. However, they argue they acted reasonably under the circumstances. Because she was naked, the Reeves assert Ashlee reasonably ignored Wierman and Churchich's commands by running from the room. The Reeves also contend Alicia acted reasonably in pushing Jones' gun away from her head. We do not necessarily disagree. However, the reasons behind the Reeves' failure to submit are immaterial to our analysis. For instance, in Bella, we recognized the plaintiff was unable to submit to the officer's show of authority because he was being held hostage at gunpoint. 24 F.3d at 1256 n.5. Nonetheless, we concluded this fact did not affect our conclusion that the plaintiff was not seized by the police officer's firing of his weapon at the plaintiff's helicopter. Id. Thus, just as we objectively examine a police officer's conduct under the Fourth Amendment, Brigham City, Utah v. Stuart, -- U.S. --, 126 S.Ct. 1943, 1948 (2006), the Reeves' subjective motives behind their failure to submit are irrelevant.

Because we conclude Churchich, Jones and Wierman's actions did not result in a seizure of the Reeves' persons, we need not determine whether such seizure was objectively reasonable.

b. Whether Churchich's Insertion of his Rifle into Alicia's Bedroom Constituted an Unlawful Search

The Reeves contend the insertion of Churchich's rifle into the interior of Alicia's bedroom window was a search

under the Fourth Amendment because the rifle crossed the "threshold of the home"*fn18 and Churchich followed Ashlee's movements with it, thereby invading her privacy. (Appellants' Opening Br. at 19.) Churchich argues the momentary insertion of his rifle through Alicia's open but barred bedroom window did not constitute a search under the Fourth Amendment. Even assuming the "threshold of the home" can be applied to a window, he claims the objective of the Fourth Amendment is to protect one's privacy. He alleges his rifle was not a surveillance device and it was not inserted for the purpose of "searching." (Appellee Churchich's Br. at 20.) Therefore, he asserts no private matter was revealed by the insertion of his rifle into Alicia's window.

A search under the Fourth Amendment "occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." United States v. Jacobsen, 466 U.S. 109, 113 (1984). Whether an individual has a constitutionally protected reasonable expectation of privacy in an object or place is a two-fold inquiry: (1) whether the individual has manifested a subjective expectation of privacy in the object or place to be searched and (2) whether that expectation is one society is prepared to recognize as reasonable. United States v. Hatfield, 333 F.3d 1189, 1195 (10th Cir. 2003). "[T]he burden of establishing a legitimate expectation of privacy is on the party claiming a Fourth Amendment violation, and we have applied that same rule to a claimed invasion of the curtilage." United States v. Cavely, 318 F.3d 987, 994 (10th Cir. 2003) (citation omitted).

It is well-settled an individual has a reasonable expectation of privacy in the interior of one's home and its curtilage. Kyllo v. United States, 533 U.S. 27, 34 (2001); Oliver v. United States, 466 U.S. 170, 180 (1984); see also

Hatfield, 333 F.3d at 1196 ("[P]rivacy in the interior of a home and its curtilage are at the core of what the Fourth Amendment protects . . . ."). However, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351 (1967); see also California v. Ciraolo, 476 U.S. 207, 213 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."). Therefore, no Fourth Amendment search occurs if a police officer makes observations while in a public place or open field, even if the objects he observes lie within an area protected by the Fourth Amendment. United States v. Dunn, 480 U.S. 294, 304 (1987). This proposition, however, is not without limitations. If those observations are obtained by a device not in general public use and they reveal information regarding the interior of the home that could not otherwise have been obtained without physical intrusion, such observations are a search under the Fourth Amendment. Kyllo, 533 U.S. at 40.

In this case, the Reeves do not argue Churchich unlawfully entered the duplex's front yard, and rightly so. Although the Reeves have a constitutionally protected reasonable expectation of privacy in the interior of their apartment, they have no such expectation in the duplex's front yard where Churchich was standing when he allegedly pointed his rifle through Alicia's bedroom window. There is no evidence the front yard is enclosed or otherwise shielded to prevent passersby from viewing the activities conducted there. There is also no evidence the Reeves could exclude others from the yard and it appears they shared the yard with the Bells.

The yard is also not part of the duplex's curtilage. "[C]urtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life." Oliver, 466 U.S. at 180 (quotations omitted). It is entitled to the same Fourth Amendment protections that attach to the home itself. Id. We consider four factors in determining whether an area around a house is considered curtilage: (1) the proximity of the area to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put, specifically, whether the area is used for the intimate activities of the home; and (4) the steps taken by the resident to protect the area from observation. Dunn, 480 U.S. at 301; United States v. Cousins, 455 F.3d 1116, 1122-23 (10th Cir. 2006). Applying these factors, although the front yard is in close proximity to the duplex, there is no evidence it (or any part thereof) is enclosed, is used for intimate activities of the home or is in any way protected from observation.*fn19 Thus, we | conclude the front yard is not within the duplex's curtilage but rather is an "open field." Dunn, 480 U.S. at 304 ("[T]he term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech.") (quotations omitted)). Therefore, Churchich's entry into the yard did not violate the Fourth Amendment. Oliver, 466 U.S. at 181 ("[A]n individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers."); Cousins, 455 F.3d at 1124 (concluding that because the defendants' sideyard did not fall within the curtilage of their home, law enforcement presence in the sideyard did not violate the Fourth Amendment). Consequently, Churchich's mere visual observation of objects or people inside the Reeves' apartment through Alicia's bedroom window from

the front yard was not a search under the Fourth Amendment.*fn20 See Dunn, 480 U.S. at 303-05 (finding police officer's visual observation of barn's interior by peering into its open front with a flashlight while standing outside the curtilage and in the open fields did not constitute a search); Hatfield, 333 F.3d at 1194 (finding officer's visual observation of the defendant's backyard from an open field (the defendant's pasture) did not constitute a search).

However, Churchich's conduct in this case was not limited merely to observation with the naked eye. Rather, he inserted his rifle past the window's ledge and followed Ashlee's movements with it. The Reeves allege this intrusion constituted a search under the Fourth Amendment. The question presented in this case is whether a police officer, while standing in an open field, conducts a search | by inserting his rifle into the interior of a home and using it to follow the movement of a person therein.

Not surprisingly, we have unearthed no cases directly on point. That is because when a police officer uses his weapon, it is normally to threaten or inflict deadly force. Under those circumstances, the inquiry is whether such use constitutes a seizure, not a search, under the Fourth Amendment. As discussed above, Churchich's pointing of his rifle at Ashlee through Alicia's bedroom window did not constitute a seizure because she failed to submit to this show of authority. We have also uncovered limited case law addressing whether a police officer conducts a search merely by sticking an object he is holding into a home's interior. In most cases, the police officer's person, or parts of his person, enter the home. Thus, we are left to analogize this case to existing precedent. Having done so, we conclude Churchich's insertion of his rifle into the interior of the Reeves' home and

following Ashlee's movement with it was not a search because the rifle was incapable of obtaining information and did not obtain any information beyond that which was observed by Churchich standing in the common area. Nor did the insertion of the rifle through the window enable Churchich to see that which would not otherwise be visible.

In Silverman v. United States, police officers used a "spike mike" to eavesdrop on the defendants' conversations. 365 U.S. 505 (1961). The officers inserted the spike under a baseboard of an adjoining house until the spike hit a heating duct serving the defendants' house. The Court found such intrusion into the home, even if it was only by a "fraction of an inch," was a search under the Fourth Amendment. Id. at 511-12.

In United States v. Knotts, police officers learned Tristan Armstrong was purchasing chemicals used in the manufacture of illegal drugs from the Hawkins Chemical Company (Hawkins). 460 U.S. 276 (1983). With Hawkins' permission, the officers installed a beeper inside a five-gallon container of chloroform, one of the chemicals being purchased. Hawkins agreed that when Armstrong next purchased chloroform, this container would be given to him. When Armstrong made the purchase, the officers followed his vehicle, maintaining contact with the car using both visual surveillance and the beeper. Armstrong proceeded to codefendant Darryl Petschen's house, where the container was transferred to Petschen's vehicle. The officers then followed that vehicle, until it began making evasive maneuvers, at which time the officers ended their visual surveillance. Almost simultaneously, the officers lost the beeper's signal. An hour later, the officers recovered the signal. Its location was identified as Leroy Knotts' cabin.

Over the next three days, the officers performed visual surveillance of the cabin. They eventually secured a search warrant, its execution uncovering a clandestine drug laboratory. Knotts was arrested and convicted for conspiring to manufacture controlled substances.

Knotts argued the officers' monitoring of the beeper without a warrant violated the Fourth Amendment. The Supreme Court disagreed. It concluded the monitoring had not invaded Knotts' legitimate expectations of privacy and thus was not a search under the Fourth Amendment. Id. at 285. It explained:

> Admittedly, because of the failure of the [officers'] visual surveillance, the beeper enabled the [officers] to ascertain the ultimate resting place of the chloroform when they would not have been able to do so had they relied solely on their naked eyes. But scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise. A police car following Petschen at a distance throughout his journey could have observed him leaving the public highway and arriving at [Knotts' cabin], with the drum of chloroform still in the car. This fact, along with others, was used by the government in obtaining a search warrant which led to the discovery of the clandestine drug laboratory. But there is no indication that the beeper was used in any way to reveal inform ation as to the movement of the drum within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin.
>
> Id. at 285 (emphasis added).

The Supreme Court distinguished Knotts in United States v. Karo, 468 U.S. 705 (1984). There, an agent with the

Drug Enforcement Administration learned James Karo, Richard Horton and William Harley had ordered fifty gallons of ether from a government informant. The ether was to be used to extract cocaine from clothing that had been imported into the United States. The agent obtained a court order authorizing the installation and monitoring of a beeper in one of the cans of ether. Thereafter, the agent observed Karo pick up the ether from the informant. The agent followed Karo to his house using both visual and beeper surveillance. Over the course of the next several months, the agent tracked the ether's movement from various locations to a rental house in Taos, New Mexico. Once the ether arrived at the rental house, the agent used the beeper to determine the ether remained in the home despite vehicles leaving the residence. When the agent noticed the windows of the house were wide open on a cold, windy day, he suspected the ether was being used. The next day, the agent applied for and received a search warrant for the Taos residence based in part on information derived from the use of the beeper. The search revealed cocaine and laboratory equipment.

The defendants challenged the agent's installation and monitoring of the beeper under the Fourth Amendment. The Supreme Court concluded the mere transfer of the can containing a beeper to Karo was not a search under the Fourth Amendment because at that time the beeper was not conveying any information. Id. at 712. However, the Court held the monitoring of the beeper while it was located within the Taos residence constituted a search under the Fourth Amendment. Id. at 714-15. In doing so, it distinguished Knotts, where the beeper told the officers nothing about the interior of Knotts' cabin and all of the information obtained could have been obtained through visual surveillance. Id. at 715.

Lastly, in United States v. Concepcion, police officers arrested Concepcion, seizing his possessions, including his keys. 942 F.2d 1170 (7th Cir. 1991). The officers found a mailbox with his last name at a nearby apartment complex. One of Concepcion's keys opened the outer door of the apartment building. Once inside the building, the officers used the key to open apartment 1C. They opened the door an inch, then immediately closed and locked it without looking inside. Concepcion argued, inter alia, that the entry of the key into his apartment door's lock constituted a search. The Seventh Circuit agreed:

> A keyhole contains information- information about who has access to the space beyond. As the fourth amendment protects private information rather than formal definitions of property, the lock is a potentially protected zone. And as the tumbler of a lock is not accessible to strangers, . . . the use of an instrument to examine its workings (that is, a key) looks a lot like a search. . . . Because the agents obtain information from the inside of the lock, which is both used frequently by the owner and not open to public view, it seems irresistible that inserting and turning the key is a search.

Id. at 1172 (citations and quotations omitted).*fn21

In both Silverman and Concepcion the courts found the police officers' insertion of an object into the home, or at least its lock, constituted a search. However, in both cases, that insertion conveyed information. In Silverman, the insertion of the spike allowed the officers to listen to conversations they would otherwise not have been able to hear. In Concepcion, the officers' insertion of the key informed the officers that the apartment belonged to the

defendant. Here, no information was obtained by insertion of the rifle into the Reeves' home.

In Knotts and Karo, the police officers themselves did not enter the home. However, like this case, they caused an object to do so. Nevertheless, the mere fact the object entered the home did not automatically transform the officers' actions into a search. Rather, only when the object revealed information that could not have been obtained by visual observation alone did a search occur. Indeed, in Karo, the Court found: "The mere transfer to Karo of a can containing an unmonitored beeper infringed no privacy interest. It conveyed no information that Karo wished to keep private, for it conveyed no information at all." 468 U.S. at 712 (emphasis added).

The same is true here. The insertion of the rifle into the open window revealed no information Churchich could not have obtained by visual observation alone. Indeed, it neither conveyed information nor facilitated Churchich's ability to attain information from within the apartment. At most then, the insertion of the rifle constituted a common law trespass, not a Fourth Amendment violation.

Of course, a police officer's mere entry or trespass into a home without consent is enough to constitute a search, often referred to in the case law as an "unlawful entry." See, e.g., Brigham City, 126 S.Ct. at 1947-48 (2006) (finding police officers' warrantless entry into home without consent is a search but a reasonable one under exigent circumstances exception to warrant requirement); United States v. Najar, 451 F.3d 710, 720 (10th Cir.) (same), cert. denied, 127 S.Ct. 542 (2006); United States v. Carter, 360 F.3d 1235, 1241-42 (10th Cir. 2004) (concluding police officer's warrantless entry

into backyard and garage was an unreasonable search because it was not supported by exigent circumstances or justified as a protective sweep); see also 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.2(c) (2d ed. 1999) ("Because the home is accorded the full range of Fourth Amendment protections, it is beyond question that an unconsented police entry into a residential unit, be it a house, apartment, or hotel or motel room, constitutes a search under Katz.") (quotations and footnote omitted). However, a police officer possesses sensory capabilities, i.e., the ability to obtain information. Indeed, in each of the cited cases, the police officers entered the home to seek information that could not have been obtained absent an intrusion. Brigham City, 126 S.Ct. at 1946 (entry to investigate observed altercation); Najar, 451 F.3d at 719 (entry to determine whether 911 caller was inside home); Carter, 360 F.3d at 1238 (entry into backyard and garage to secure it and prevent destruction of evidence). A rifle, on the other hand, does not possess sensory capabilities and its insertion in this case was not for purposes of obtaining information.

Because Churchich's insertion of his rifle inside Alicia's bedroom was not a search, we need not determine whether it was objectively reasonable. We now turn to the Reeves' argument that they were unlawfully seized by Churchich and The Officers' overall conduct at the scene.

c. Whether Churchich and The Officers' Overall Conduct Towards the Reeves at the Scene Constituted an Unlawful Seizure

The Reeves contend the overall conduct towards them at the scene conveyed to them they were not free to ignore Churchich and The Officers' presence and go about their

business and thus constituted a seizure of their persons within the meaning of the Fourth Amendment.*fn22 Churchich and The Officers argue their actions did not seize the Reeves. They claim it is undisputed that neither Alicia nor Ashlee was physically restrained, informed they were being detained or told they were not free to leave. Indeed, Churchich and The Officers allege the Reeves never asked whether they were free to go or stated they wished to leave the apartment. They point out Ashlee never attempted to leave the apartment and never spoke with any of them. In fact, they allege it was Alicia who told her to stay in the apartment. Churchich and The Officers also emphasize Alicia left her apartment at least four times during the incident.

A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the encounter, a reasonable person would have believed he was not free to leave, decline the officers' requests or otherwise terminate the encounter. Florida v. Bostick, 501 U.S. 429, 439 (1991); United States v. Mendenhall, 446 U.S. 544, 554 (1980); see also Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) ("[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."). In Mendenhall, the Court provided "[e]xamples of circumstances that might indicate a seizure, even where the person did not attempt to leave . . . ." 538 U.S. at 554. Such circumstances included "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that

compliance with the officer's request might be compelled." Id.

To these circumstances we have added the "prolonged retention of a person's personal effects," "a request to accompany the officer to the station," "interaction in a nonpublic place or a small, enclosed place" and the "absence of other members of the public." Jones v. Hunt, 410 F.3d 1221, 1226 (10th Cir. 2005) (quotations omitted). "None of these factors are dispositive, nor should they be treated as exclusive . . . ." Fuerschbach v. Sw. Airlines Co., 439 F.3d 1197, 1203 (10th Cir. 2006).

The Reeves' actions, in particular Alicia's, clearly contradict their argument for seizure within the meaning of the Fourth Amendment. As to Ashlee, it is undisputed she never left or attempted to leave the apartment during the incident. Nevertheless, Churchich and The Officers' pointing of their rifles would have conveyed to a reasonable person in Ashlee's position, especially considering her age, that she was not free to leave. Jones, 410 F.3d at 1226 (stating we must look at whether a reasonable person of plaintiff's age would have felt free to leave). With regards to Alicia, her conduct at the scene belies her contention that she believed she was not free to leave the apartment. By her own account, she left the apartment four times to determine the purpose of the police activity. She did so despite Churchich and The Officers' allegedly harsh verbal commands to return to her apartment and their display and pointing of weapons.*fn23

To the extent a seizure occurred, such seizure was objectively reasonable. The Fourth Amendment only prohibits unreasonable searches and seizures. Pennsylvania v. Mimms, 434 U.S. 106, 108-09 (1977) ("The touchstone of

our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.") (quotations omitted). "In judging [the] reasonableness [of a seizure], courts apply a balancing test that looks to the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." Walker v. City of Orem, 451 F.3d 1139, 1148 (10th Cir. 2006) (quotations omitted). Considering the totality of the circumstances, we conclude any seizure of the Reeves which occurred during the attempted apprehension of Diviney was reasonable.

Churchich and The Officers were attempting to apprehend a potentially armed suspect, whom they had probable cause to arrest for assault. Therefore, it was reasonable for them to have their weapons displayed and ready for immediate use.

Holland v. Harrington, 268 F.3d 1179, 1192 (10th Cir. 2001) ("The display of weapons . . . should be predicated on at least a perceived risk of injury or danger to the officers or others, based upon what the officers know at that time."); Thompson v. City of Lawrence, Kan., 58 F.3d 1511, 1516 (10th Cir. 1995) (not unreasonable for officers to carry weapons when entering the premises of a suspected felon with a reputation for possessing firearms). They also reasonably pointed their weapons at the Reeves. While neither Alicia nor Ashlee was the male suspect Churchich and The Officers were looking for, they did not know the nature of their relationship, if any, to Diviney. Thompson, 58 F.3d at 1517 (handcuffing and detention of plaintiff at arrest scene reasonable where police did not know the nature of her

relationship to arrestee). It is also undisputed that Churchich and The Officers' pointing of their weapons at the Reeves was brief and limited in duration to determining the Reeves' threat level. Once the perceived threat was extinguished, Churchich and The Officers did not continue to point their weapons at them. Cf. Holland, 268 F.3d at 1193 ("Where a person has submitted to the officers' show of force without resistance, and where an officer has no reasonable cause to believe that person poses a danger to the officer or to others, it may be excessive and unreasonable to continue to aim a loaded firearm directly at that person, in contrast to simply holding the weapon in a fashion ready for immediate use.") (emphasis added).

It was also reasonable for Churchich and The Officers to order the Reeves to return to their apartment. They were faced with a potentially volatile situation and the Reeves' safety may have been at risk. Additionally, Alicia repeatedly interfered with the task at hand. It was reasonable for Churchich and The Officers to direct her to return to her apartment. Moreover, based on Alicia's refusal to comply with Churchich and The Officers' demands to return to her apartment, it was reasonable to increase the harshness and tone of their commands. Indeed, "this case presents the classic situation in which a plaintiff's own actions in reaction to a legitimate law enforcement encounter result in escalating volatility and danger justifying the subsequent actions of the law enforcement officers involved." Latta, 118 F.3d at 698; see also Michigan v. Summers, 452 U.S. 692, 702-03 (1981) (concluding detention of occupant of place to be searched during execution of search warrant was reasonable; "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation").

Of course, we do not condone Officer Housley calling Alicia a "bitch." As we recognized in Holland, "expletives communicate very little of substance beyond the officer's own personal animosity, hostility or belligerence" and "[o]ne can be firm and direct without being foul and abusive." 268 F.3d at 1194. Nevertheless, the use of such single expletive at someone who was not heeding an officer's orders does not render the officer's otherwise lawful conduct unreasonable.

2. Clearly Established

Because Churchich and The Officers' conduct at the scene, both their specific actions and overall conduct, did not violate the Reeves' constitutional rights, no further inquiry is necessary. The district court correctly concluded they were entitled to qualified immunity.

B. Supervisor Liability

The Reeves contend the district court erred in dismissing their supervisory liability claim against Churchich. They allege Churchich's failure to properly supervise and inform The Officers was the cause in fact of The Officers' violations of their constitutional rights and Churchich should be held responsible for these violations.*fn24 Even assuming Churchich was The Officers' supervisor, because The Officers did not violate the Reeves' constitutional rights, no supervisory liability attaches to Churchich. See Serna v. Colo. Dep't of Corr., 455 F.3d 1146, 1151 (10th Cir. 2006) ("In order to establish a § 1983 claim against a supervisor for the unconstitutional acts of his subordinates, a plaintiff must first show the supervisor's subordinates violated the constitution.").

AFFIRMED.

Opinion Footnotes

*fn1 The Bell residence was located in Salt Lake City which is within Salt Lake County. Although the residence was within the Salt Lake County Sheriff Department's jurisdiction, the department's policy was to contact the city police department which had specific jurisdiction and allow it to assist.

*fn2 Churchich was wearing a suit; The Officers were in uniform.

*fn3 The purpose of containment is to prevent the suspect from fleeing out the back of the residence.

*fn4 Although Churchich was aware the Bell residence was the upstairs apartment of a duplex, it is unclear whether The Officers knew this.

*fn5 Jones, Bruno and Housley carried their handguns either at their sides and pointing to the ground or in the "low ready" position. The "low ready" position involves the police officer gripping the gun with both hands in front of him while pointing it to the ground.

*fn6 None of the windows in the Reeves' apartment had screens. However, all of the windows had bars.

*fn7 According to Wierman, he saw "some movement" through the downstairs apartment window. (R. Vol. II at 336.) When he observed this, he said "Police. Don't

move." (Id. at 337 (quotations omitted).) Because it was a possible threat, he also pointed his rifle at the window. By the time he made this order, however, the "movement" was already heading west toward the front of the residence, out of Wierman's view.

*fn8 Churchich denies looking into or pointing his rifle into any ground level window. However, he accepted Ashlee's version of events for purposes of his summary judgment motion.

*fn9 Jones was not deposed. However, Bruno and Housley testified Jones did not point his weapon at Alicia. Housley stated Alicia was leaving through the front door of the duplex just as she, Jones and Bruno were approaching it. They asked Alicia which residence belonged to the Bells; Alicia pointed to the upstairs apartment. In any event, Churchich and The Officers admitted Jones pointed his weapon at Alicia for purposes of their summary judgment motions.

*fn10 According to Alicia, The Officers grabbed Sharon Bell by her shirt, threw her down on the ground and held her down. Alicia stated she yelled at The Officers, trying to get them to stop hurting Sharon. Sharon Bell filed a lawsuit against Churchich and The Officers, which was settled.

*fn11 Housley denies calling Alicia a "bitch."

*fn12 Churchich denies pointing his rifle at Alicia. In fact, he testified he does not recall seeing or talking with Alicia on the day of the incident. However, he admitted this allegation for purposes of his summary judgment motion. In

an affidavit Sharon Bell said she heard Churchich tell Alicia to go back inside her apartment and saw him point his rifle at her.

*fn13 The complaint also named police officers Bruno, Wichmann, Hedenstrom and Louie Muniz, as well as Salt Lake County Sheriff's Officer Ray Lopez and Detective Odor. Muniz, Lopez and Odor played little or no role in assisting Detective Churchich in the attempted apprehension of Diviney. The Reeves stipulated to these officers' dismissals without prejudice in March 2003 and May 2004.

*fn14 The Reeves further asserted pendent state law claims of assault, unlawful detention and intentional infliction of emotional distress. The district court granted judgment in favor of Churchich and The Officers on these claims pursuant to the Utah Governmental Immunity Act. The Reeves do not challenge this ruling on appeal.

*fn15 In neither her deposition nor affidavit did Ashlee testify that Officer Wierman pointed his rifle at her. She simply stated she observed officers with guns at their side in the backyard and heard one of them say "Hold it right there." (R. Vol. II at 470 (quotations omitted).) However, Wierman admitted at his deposition that when he saw "some movement" through Ashlee's bedroom window, he pointed his rifle towards the movement. (Id. at 336.)

*fn16 In their opening brief, the Reeves allege that when Officer Jones pointed his handgun at Alicia's head, he ordered her to "[h]old it right there." (Appellants' Opening Br. at 10.) This command is not supported by the Reeves' record citations; thus, we disregard it.

*fn17 When she initially recounted the events of June 21 at her deposition, Alicia testified Officer Jones pointed his gun at her face. Later in her deposition, she stated the gun physically touched her face. In their response to the motions for summary judgment and opening brief, the Reeves do not allege Jones' gun physically touched Alicia. They merely claim Jones "put his handgun to her head" and "pointed it at her head." (R. Vol. I at 166; Appellant's Opening Br. at 9-10.) In any event, even assuming Jones' handgun touched Alicia's face, no seizure occurred because she failed to submit to this assertion of authority. Bella, 24 F.3d at 1256 (finding no seizure occurred even though one of the officer's shots hit the helicopter).

*fn18 Ashlee testified Churchich's rifle came through Alicia's bedroom window, "so it was farther than the [window's] ledge, [which is] inside the room." (R. Vol. II at 470-71.) She later testified the rifle was "even up with the ledge or maybe a little bit over." (Id. at 471.) In her affidavit, she stated the rifle "had been put through the foliage and bars on the window" and its barrel "was inside [the] bedroom." (Id. at 537.) Thus, we assume the rifle entered the room.

*fn19 The Reeves' argument expects us to presume their front yard was curtilage. They assume too much. There were no proofs regarding the Dunn curtilage factors and nothing in the record suggests the Reeves had a reasonable expectation of privacy in the front yard of a jointly occupied apartment. See Cavely, 318 F.3d at 994 ("The record before us contains no evidence on these matters [Dunn factors], and appellant did not ask the district court to make any findings with respect thereto."). Absent contrary facts and findings, the correct presumption would be that an unenclosed yard, used for no particular purpose (but shared with other tenants),

adjacent to the street, and in no way shielded from observation or trespass is not curtilage.

*fn20 The fact Alicia's window contained bars covered in foliage does not detract from this conclusion. "[T]he mere fact that an individual has taken measures to restrict some views of his activities [does not] preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible." Ciraolo, 476 U.S. at 213. Additionally, Alicia's bedroom window was open. There is no allegation that Churchich moved the window's blinds, either with his rifle or hand, to obtain a better view of the home's interior.

*fn21 But see United States v. Lyons, 898 F.2d 210, 212 (1st Cir. 1990) (insertion of key seized from the defendant into padlock of storage unit for purposes of identifying ownership not a search).

*fn22 Although we have concluded the Reeves were not seized when Churchich, Jones and Wierman pointed their weapons and made verbal commands toward them, the Reeves could have potentially been unlawfully seized at other times during the encounter. Therefore, in resolving the Reeves' argument that they were illegally seized by Churchich and The Officers' overall conduct at the scene, we look to the entire encounter, not merely the specific instances addressed earlier.

*fn23 The Reeves' argument that they were seized because Churchich and The Officers' actions prevented them from going about their business of getting dressed and taking a nap is equally unavailing. They rely on Kaupp v. Texas, which in turn relied on Bostick and Michigan v. Chesternut,

486 U.S. 567 (1988), for the proposition that a seizure of a person "occurs when, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." Kaupp v. Texas, 538 U.S. 626, 629 (2003) (quotations omitted). The fact the Reeves may not have been able to continue with the specific activities they were engaged in prior to Churchich and The Officers' presence is irrelevant. The key is that they were free to continue in activities not mandated by Churchich and The Officers. In fact, Alicia's subsequent activities were directly contrary to Churchich and The Officers' requests that she return to her apartment.

*fn24 There was conflicting testimony on this point. Churchich testified The Officers were in charge of how Diviney would be apprehended. Officer Bruno agreed. Officer Wierman testified Churchich was "definitely" involved "to some degree" in deciding how The Officers were to proceed in apprehending Diviney but stated his specific conduct at the scene was at his own discretion. (R. Vol. II at 318.) Officer Munoz testified the primary responsibility in an agency assist rests with the agency requesting the assistance. Officer Housley stated Churchich was "in charge" of The Officers but they would have only followed his suggestions if they were reasonable. (Id. at 394.) Officer Wierman, on the other hand, considered Officer Jones to be in charge of The Officers.

Appendix A

[APPENDIX B]

Reeves v. Churchich,
United States District Court,
D. Utah,
Northern Division.

Alicia REEVES and Ashlee Reeves, Plaintiffs,
v.
Alex CHURCHICH, Ray Lopez, Officer Odor, Kevin Jones, Ron L. Bruno, David Wierman, C. Housley, Officer Wichman, Officer Hedenstrom, Louie D. Munoz, and John and Jane Does 1-15, Defendants.

No. 2:02 CV 0551 DAK.
Sept. 2, 2004.

Background: Residents of downstairs apartment brought civil rights suit against county detective and city police officers, alleging they were unlawfully seized when officers surrounded and entered common areas of duplex looking for suspect. Defendants moved for summary judgment and to strike portions of affidavits and exhibits.

Holdings: The District Court, Kimball, J., held that:
(1) officers were entitled to qualified immunity;
(2) Utah Government Immunity Act barred state tort claims;
(3) motion to strike affidavits was moot; and
(4) expert's testimony would be ignored to extent it stated legal conclusions.

Motions granted in part and denied in part.

*1348 Matthew H. Raty, Esq., Law Office of Matthew H Raty, Salt Lake City, UT, for Plaintiffs.
*1349 J. Wesley Robinson, Esq., Salt Lake City Attorneys Office, Salt Lake City, UT, T.J. Tsakalos, Esq., Salt Lake County Attorneys Office, Salt Lake City, UT, for Defendants.

MEMORANDUM DECISION AND ORDER

KIMBALL, District Judge.
This matter is before the court on (1) Defendants Kevin Jones, David Wierman, and Christie Housley's (collectively referred to herein as "City Defendants") Motion for Summary Judgment, (2) Defendant Churchich's Motion for Summary Judgment, (3) Defendant Churchich's Motion to Strike Paragraph and Exhibit from Plaintiffs' Memorandum in Opposition to Defendants' Motions for Summary Judgment, and (4) Defendant Churchich's Motion to Strike Portions of the Affidavits of Alicia Reeves and Ashlee Reeves. The City Defendants have joined in both motions to strike submitted by defendant Churchich. A hearing on the motions was held on July 27, 2004. At the hearing, plaintiffs Alicia Reeves and Ashlee Reeves were represented by Matthew H. Raty. The City Defendants were represented by Nicholas D'Alesandro and defendant Alex Churchich was represented by J. Wesley Robinson. Before the hearing, the court considered carefully the memoranda and other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to these motions. Now being fully advised, the court renders the following Memorandum Decision and Order.

I. MOTIONS FOR SUMMARY JUDGMENT

A. Standard of Review

Summary judgment is appropriate if the record before the court shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "When, as in this case, the moving party does not bear the ultimate burden of persuasion at trial, it may satisfy its burden by pointing to a 'lack of evidence for the nonmovant on an essential element of the nonmovant's claim.' " Sports Unlimited, Inc. v. Lankford Enter., Inc., 275 F.3d 996, 999 (10th Cir.2002) (quoting Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 671 (10th Cir.1998)). "[T]he plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment." Anderson, 477 U.S. at 257, 106 S.Ct. 2505. The court will "view the evidence and draw any inferences therefrom in the light most favorable to the party opposing summary judgment." MacDonald v. Delta Air Lines, Inc., 94 F.3d 1437, 1440 (10th Cir.1996).

B. Background

Plaintiffs claim that their Fourth Amendment rights to be free from unreasonable searches and seizures were violated when defendants attempted to arrest a suspect believed to be staying in the same apartment duplex as plaintiffs. Plaintiffs resided in the lower level apartment of the duplex and defendants were searching for a suspect believed to be staying in the upper level apartment. The primary factual basis for the claims is that the officers pointed guns at the plaintiffs on several occasions while attempting to locate and arrest the suspect. Plaintiffs seek relief under 42 U.S.C. §

1983 and allege state law causes of action for: (1) assault; (2) *1350 unlawful detention; and (3) intentional infliction of emotional distress. Plaintiffs also allege that defendant Churchich is responsible for the constitutional violations of the other defendants under the doctrine of supervisory liability. Based upon the stipulations of the parties, the court previously dismissed all claims against defendants Ray Lopez, Officer Odor, Ron L. Bruno, Officer Wichman, Louie D. Muniz, and Officer Hedenstrom. The remaining defendants have moved for summary judgment as to all claims.

Defendant Churchich is a detective with the Salt Lake County Sheriff's Office. The City Defendants are all members of the Salt Lake City Police Department. Detective Churchich received information that a suspect he was seeking to arrest for domestic assault might be staying with relatives in an apartment located in the upstairs half of a duplex in Salt Lake City. The downstairs half of the duplex was occupied by plaintiffs Alicia Reeves and her daughter Ashlee Reeves. At the time of the incident, Alicia Reeves was 14 years old. Detective Churchich contacted the Salt Lake City Police Department for assistance in apprehending the suspect. Detective Churchich and the participating Salt Lake City police officers had reason to believe that the suspect had access to firearms and therefore could be armed. On June 21, 2000, the defendants attempted to apprehend the suspect at the duplex. The officers did not have an arrest warrant for the suspect or a search warrant for either apartment in the duplex. Detective Churchich believed there was probable cause to arrest the suspect and intended to get permission to enter and search the upstairs apartment of the duplex.

As the officers approached the duplex, some went to the front door and others circled the building to do

"containment." The duplex has one exterior door in the front that provides an entryway and access via stairways to both the upper and lower apartments in the duplex. All of the officers were armed. Ashlee Reeves claims that she was in her room naked after having just exited the shower when she saw a police officer outside of her open but barred window pointing a gun at her and telling her not to move. She immediately grabbed a towel and fled the bedroom to tell her mom about what was going on. Ashlee's mom, Alicia, was asleep on the couch. Ashlee woke her mom and then went into her mom's bedroom to put on some clothes. Ashlee claims that while in her mother's bedroom another gun was pointed at her through the bedroom window and the officer instructed her to "get down on the floor." In response to the officer's command, Ashlee closed the blinds in her mother's bedroom and went back to the living room to once again try to wake her mom.

Due to the Reeves' dog barking and Ashlee's attempts to wake her, Alicia awoke and decided to let the dog outside. Alicia claims that while attempting to put her dog outside, a police officer put a handgun to her head and said "hold it right there." Alicia claims that she responded to this show of force by pushing the gun away and asking questions about what was going on. Alicia went back into her apartment but then returned to try and ask the officers more questions about what was taking place. According to plaintiffs' statement of facts, Alicia began yelling at the officers because she felt they were hurting her neighbor. Alicia alleges that in response to her questioning, a female officer called her a "bitch" and told her to get back in her apartment. The police never found the suspect at the duplex. He was later apprehended in Las Vegas, Nevada.

The police officers never entered the Reeves apartment nor did they physically *1351 restrain or touch plaintiffs. The only allegation is that the officers pointed firearms at plaintiffs on several occasions, instructed them to go back inside or stay in their apartment, and on one occasion, called Alicia a "bitch." It is also uncontested that on several occasions Alicia and Ashlee ignored the officers' commands. Plaintiffs do not claim any physical injuries from the incident, but rather, seek to recover for emotional and psychological injuries.

C. Discussion

1. Qualified Immunity

Defendants have properly raised the affirmative defense of qualified immunity. By doing so, the burden shifts to the plaintiffs to demonstrate that the defendants violated a constitutional right and that the right was clearly established at the time of defendants' conduct. See Holland ex rel. Overdorff v. Harrington, 268 F.3d 1179, 1185-86 (10th Cir.2001). "If the plaintiff fails to satisfy either part of the two-part inquiry, the court must grant the defendant qualified immunity." Id. at 1186.

For plaintiffs to prevail on their Fourth Amendment claim, they must establish that there was a search and/or seizure and that the search and/or seizure was unreasonable. "A seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when, 'taking into account all the circumstances surrounding the encounter,' the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " Kaupp v. Texas, 538 U.S. 626, 629, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003) (quoting

Florida v. Bostick, 501 U.S. 429, 437, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) (citation omitted)). "It must be remembered that '[t]he Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general.' " Bella v. Chamberlain, 24 F.3d 1251, 1256 (10th Cir.1994) (quoting Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir.1993) (emphasis in original)). "A search for purposes of the Fourth Amendment occurs when government officials violate an individual's legitimate expectation of privacy." United States v. Nicholson, 144 F.3d 632, 636 (10th Cir.1998).

The Fourth Amendment requires the court to examine the reasonableness in which a search or seizure is conducted. "The determination of reasonableness of a seizure involves the balancing of the individual's Fourth Amendment interests against the importance of the governmental interest at stake." Thompson v. City of Lawrence, Kansas, 58 F.3d 1511, 1517 (10th Cir.1995). Fourth Amendment reasonableness must be objectively examined under the totality of the circumstances. See Holland, 268 F.3d at 1195. When judging the reasonableness of the officers' actions in this case, the court must take into account the uncertain and evolving circumstances inherent in attempting to locate and arrest a potentially violent suspect.

Assuming that the plaintiffs can establish that a search or seizure took place, the court finds that plaintiffs have failed to demonstrate that the defendants actions were objectively unreasonable under the totality of the circumstances. It is well-established that it is reasonable for an officer to temporarily display force or restrain a person until that person's relationship to the suspect and possible reaction to the situation can be ascertained. See Thompson, 58 F.3d at 1517 ("Given the volatility of the situation, we

hold that it was objectively reasonable for the officers to temporarily restrain [plaintiff], whose relationship to [the suspect] and possible reaction to the situation were unknown."). As noted by the Supreme Court, "[t]he risk of harm to both the police and the *1352 occupants is minimized if the officers routinely exercise unquestioned command of the situation." Michigan v. Summers, 452 U.S. 692, 702, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). It is undisputed that the plaintiffs largely ignored the officers's commands thereby greatly increasing the volatility of the plaintiffs' encounter with the officers.

This is not a situation, as was found in Holland, where the officers allegedly held children that posed no threat of danger at gunpoint on the ground for ten to fifteen minutes. Holland, 268 F.3d at 1192. Plaintiffs only had weapons pointed at them for a few seconds at a time and rarely, if ever, submitted to the officers' commands. Even in Holland, the court noted that the officers "initial show of force may have been reasonable under the circumstances" but that the officers crossed the line when they continued to hold the children at gunpoint "after the officers had gained complete control of the situation." Id. at 1193. The officers in the instant case never gained complete control over the plaintiffs, nor did they hold the plaintiffs at gunpoint for extended periods of time. The defendants show of force was reasonable given the totality of the circumstances.

While an officer's use of a term such as "bitch" towards a citizen is certainly no cause for commendation, it is not sufficient to rise to the level of a Fourth Amendment violation under the totality of the circumstances in this case.

> In evaluating the Fourth Amendment reasonableness of a seizure, the

> officers' verbal interaction as well as their physical conduct become part of the totality of the circumstances to be considered. While it seems unlikely that harsh language alone would render a search or seizure "unreasonable," verbal abuse may be sufficient to tip the scales in a close case.

Id. at 1194. The only allegation made against Officer Housley is that she called Alicia a "bitch" and told her to get back in her apartment. That alone, is not enough to find Officer Housley liable for violating plaintiffs' Fourth Amendment rights. Likewise, the other defendants' momentary pointing of weapons at plaintiffs while attempting to locate and arrest a potentially armed suspect believed to be in the same building as plaintiffs, does not rise to the level of a Fourth Amendment violation.

2. Supervisor Liability

A supervisor "may be held liable for the alleged unconstitutional acts of his subordinates if [plaintiffs] demonstrate an 'affirmative link' through facts showing that he actively participated or acquiesced in the constitutional violation." Id. at 1187. The court need not determine whether Detective Churchich was a supervisor to the City Defendants because the court has already held that defendants did not commit any constitutional violations and therefore Detective Churchich cannot be found liable under a theory of supervisor liability.

3. State Law Claims

Utah's Governmental Immunity Act prohibits plaintiffs from pursuing their claims for assault, unlawful detention, and intentional infliction of emotional distress unless they can prove defendants "acted or failed to act through fraud or malice." Utah Code Ann. § 63-30-4(3)(b)(i). Plaintiffs' brief cites a new version of the Governmental Immunity Act that became effective on July 1, 2004 to argue that they need only prove "willful misconduct." (Pls.' Mem. in Opp'n. to Defs.' Mot. for Summ. J. at 40-41.) The Utah Code states that "[n]o part of these revised statutes is retroactive, unless expressly so declared." Utah Code Ann. § 68-3-3. "Utah courts follow the general rule that 'a statute *1353 generally cannot be given retroactive effect unless the legislature expressly declares such an intent in the statute.' " Thomas v. Color Country Management, 84 P.3d 1201, 1209-10 (Utah 2004) (Durham, J., concurring) (quoting Washington Nat'l Ins. Co. v. Sherwood Assocs., 795 P.2d 665, 667 (Utah Ct.App.1990)). The new version of the Governmental Immunity Act cited by plaintiffs does not contain an express declaration that it is retroactive and therefore is not applicable to this case. The proper standard for determining whether the state law claims can survive Utah's Governmental Immunity Act is whether the defendants "acted or failed to act with fraud or malice." Utah Code Ann. § 63-30-4(3)(b)(i).

There is no allegation in this case of fraud and plaintiffs have failed to provide evidence sufficient to support a finding that the defendants acted with malice. It is undisputed that plaintiffs were not the target of the officers' activities at the duplex. Plaintiffs were unknown to the officers prior to the incident and there is not sufficient evidence of ill will or spite towards the plaintiffs to support a finding of malice. Plaintiffs' state law causes of action are barred by Utah's Governmental Immunity Act.

II. MOTIONS TO STRIKE

Defendants have moved to strike certain portions of Alicia Reeves' and Ashlee Reeves' affidavits as well as the testimony of plaintiffs' expert. The court has carefully reviewed that affidavits of Alicia Reeves and Ashlee Reeves and determined that, even if admitted, they do not contain any factual allegations that would affect the outcome in this case. The motion to strike portions of the affidavits of Alicia Reeves and Ashlee Reeves is moot.

Paragraph 108 of plaintiffs' material facts states "[e]xpert D.P. Van Blaricom ... has testified that Plaintiffs were seized, that Defendants' actions were objectively unreasonable, and that Defendant Churchich failed to properly supervise the SLCPD Officers." (Pls.' Mem. in Opp'n. to Defs.' Mot. for Summ. J. at 22.). In essence, plaintiffs' expert has stated a legal conclusion that defendants' actions violated the Fourth Amendment. It is the court-not plaintiffs' expert-that is responsible for determining whether defendants' conduct violates the Fourth Amendment for purposes of the qualified immunity analysis. The court will not strike the report and testimony of Mr. Van Blaricom in its entirety, but will disregard his testimony to the extent it merely states a legal conclusion.

III. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that: (1) Defendants Kevin Jones, David Wierman, and Christie Housley's Motion for Summary Judgment is GRANTED; (2) Defendant Churchich's Motion for Summary Judgment is GRANTED; (3) Defendant Churchich's Motion to Strike Portions of the Affidavits of Alicia Reeves and Ashlee Reeves is MOOT: and (4)

Defendant Churchich's Motion to Strike Paragraph and Exhibit from Plaintiffs' Memorandum in Opposition to Defendants' Motions for Summary Judgment is GRANTED in part and DENIED in part. This case is dismissed with prejudice in its entirety. The Clerk of the Court is directed to enter judgment accordingly.

D.Utah,2004.
Reeves v. Churchich
331 F.Supp.2d 1347

OPPOSITION BRIEF

2

No. 07-466

FILED
JAN 18 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

81

In The

Supreme Court of the United States

ALICIA REEVES and ASHLEE REEVES,

Petitioners,

vs.

ALEX CHURCHICH, KEVIN JONES, DAVID WIERMAN, and C. HOUSLEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ISSUE ON APPEAL

Did the United States Court of Appeals for the Tenth Circuit correctly affirm the United States District Court's ruling that Respondents Kevin Jones ("Jones"), David Wierman ("Wierman"), and C. Housley ("Housley") (hereinafter referred to collectively as the "City Respondents") were entitled to qualified immunity?

RESPONSE TO PETITIONERS' STATEMENT OF THE CASE

The City Respondents concur in Petitioners' (the "Reeves") Statement of the Case, with the following exceptions:

1. Throughout the Statement of the Case and Argument sections, the Reeves repeatedly allege they were "assaulted" by various Respondents at various points in time. Such allegations are not facts, but are unsupported argument, and should be ignored by the Court. Neither Petitioner was "assaulted" by any City Respondent.

2. The Reeves contend that Respondent Wierman "pointed his rifle at Ashlee." *Petition for Writ of Certiorari to the Tenth Circuit Court of Appeals (hereinafter referred to as "Petition"), p. 4.* This allegation is unsupported by the record. The Reeves cite to Record pages 337-38 (Appellants' Appendix to Tenth Circuit Court of Appeals Brief), the deposition of

Respondent Wierman, as support for this allegation. Respondent Wierman clearly testified that he only saw movement through the window, did not observe a teenage girl, and only pointed his rifle "into that room." *R. 338:10.* He also testified that "the most accurate way to describe it is pointed at the window." *R. 340:16-17.*

Furthermore, in neither her affidavit nor deposition did Ashlee Reeves testify that Respondent Wierman pointed his rifle at her. In fact, Ashlee testified in her deposition that no guns were pointed at her while she was in her bedroom. *R. 470, 54:3-18.*

3. The Reeves contend, for the first time in this litigation, that Ashlee was "shocked that an adult man was looking into her back bedroom window . . . " *Petition, p. 4.* Their citation to the record does not support this allegation, nor does any other evidence in the record. Ashlee's deposition testimony contradicts this allegation. She testified that she "couldn't see any faces" (*R. 470, 52:18-21; R. 472, 60:18-21*), could only see the officers from their knees down (*R. 470, 52:22-25; R. 472, 60:18-21*), and never got "face to face with anybody" (*R. 470, 54:6-9, 55:1-3*).

4. The Reeves' allegation that Respondent Jones told Alicia to "hold it right there" while pointing a pistol at her head is unsupported by their record citations, and thus should be disregarded.

5. The Reeves allege that Alicia was "prevented from ever leaving the duplex," and "was not allowed to leave the duplex." *Petition, pp. 6-7.* Again there is

no support for these claims in the record. Indeed, the factual record contradicts these claims. By her own admission, Alicia Reeves left her apartment at least four times to confront and/or question the officers. *R. 207-08, 38:9-41:6; R. 212-13, 58:9-61:21.* Further, Alicia was never physically restrained or touched by any officer, she was never informed that she was being detained or was not free to leave, nor did she ask whether she was free to leave or state her intention to leave.

SUMMARY OF ARGUMENT

Petitioners have demonstrated no need for "clarification" of this Court's prior interpretations of Fourth Amendment law, nor that any "new analytical framework" is necessary under the facts of this case. No Supreme Court precedent is cited that presents any conflict or inconsistency with the lower court decisions in this matter. To the contrary, those decisions are entirely consistent with well-established principles of Fourth Amendment jurisprudence.

The Tenth Circuit properly affirmed summary judgment in the City Respondents' favor. Contrary to the Reeves' assertions, they were not detained by any of the City Respondents, and any belief that they were detained was patently unreasonable. It is undisputed that no officer entered the Reeves' apartment, nor was either woman subjected to any type of physical restraint or touched in any way. No officer

told them they were being detained, or that they were not free to leave the duplex at any time. Neither Petitioner asked if they were free to go, or whether they were being detained, or stated their desire to leave the duplex.

The City officers acted reasonably under the circumstances, where the uncertain and evolving events inherent in attempting to locate and arrest a potentially dangerous suspect required caution, and an obligation to ensure the safety of the innocent occupants of the duplex. The Reeves' were not the focus of the officers' attention that day – apprehending a potentially armed felon was. Neither woman was interrogated, investigated or made to feel they were the subjects of the officers' attention.

In spite of the officers' attempts to ensure her safety, Alicia Reeves ignored repeated requests to return to her apartment while the officers attempted the arrest. Alicia came and went from her apartment at will, as many as four or five times. While she claims to have feared for her life, she repeatedly placed herself in harm's way, demanding that the officers pay attention to her rather than the job at hand. Ashlee Reeves never left, or even attempted to leave, her apartment, and did not speak with any officers. The Reeves' words and deeds belie their contention that they were being detained, or that they wanted to leave the duplex at all.

The Tenth Circuit was correct in affirming that the City Respondents were entitled to qualified

immunity. Tenth Circuit and United States Supreme Court case law clearly establishes an officer's right to display firearms when faced with the possibility of danger. It further establishes an officer's right, indeed an obligation, to ensure the safety of innocent bystanders under such circumstances. The Tenth Circuit has recognized the important governmental interest in securing the area around a potentially dangerous suspect, holding that it was reasonable to point a weapon at and temporarily detain a bystander whose relationship to the suspect and possible reaction to the situation were unknown.

The momentary pointing of a firearm at Alicia Reeves did not rise to the level of a constitutional violation, nor did it reasonably convey to the appellants that they were not free to leave. The alleged swearing at Alicia, while not commendable, was similarly insufficient to constitute a Fourth Amendment violation.

This Court should DENY the petition for writ of certiorari in this case.

ARGUMENT

I.

THE TENTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT.

A.

The City Respondents were entitled to qualified immunity.

A government officer is entitled to qualified immunity from civil damages when his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1981). "As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability." *Harlow*, 457 U.S. at 806.

"Although actions for damages provide an important remedy for individuals injured by governmental officials' abuse of authority, such actions sometimes subject officials to costly and harassing litigation and potentially inhibit officials in performing their official duties." *Medina v. Cram*, 252 F.3d 1124, 1127 (10th Cir. 2001). "In order to balance these competing interests, courts recognize the affirmative defense of qualified immunity, which protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (*quoting Malley v. Briggs*, 475 U.S. 335, 341 (1986)). A court "should resolve the 'purely legal

question,' *Siegert v. Gilley*, 500 U.S. 226, 232 (1991), raised by a qualified immunity defense 'at the earliest possible stage in litigation.'" *Medina*, 252 F.3d at 1128 (*quoting Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995)).

Substantial lawsuits can be terminated on a properly supported motion for summary judgment based upon the defense of qualified immunity. (*Harlow*, 457 U.S. at 808 (*citing Butz v. Economou*, 438 U.S. 478 (1978) and *Scheuer v. Rhodes*, 416 U.S. 232 (1974)). In order to use the defense of qualified or good faith immunity against an alleged violation of constitutional rights, this Court has held that there is both an objective and subjective aspect. *Id.* at 815.

> Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.

(*Id.* (*citing Wood v. Strickland*, 480 U.S. 308 (1975)). The Court held that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18.

Plaintiff must also allege and prove that the particular acts of the defendant were contrary to

clearly-established law. *Anderson v. Creighton*, 107 S.Ct. 3034 (1987). A Tenth Circuit or United States Supreme Court decision on point is needed to show that the law was clearly established. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 107 S.Ct. at 3039.

Once the defendant government official raises a qualified immunity defense, the summary judgment burden is shifted to the plaintiff. *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988). The plaintiff bears a "heavy two-part burden" in response to assertion of a qualified immunity defense, requiring the plaintiff to "demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendants' actions were clearly prohibited." *See Scull v. New Mexico*, 236 F.3d 588, 595 (10th Cir. 2000); *Adkins v. Rodriguez*, 59 F.3d 1034, 1036 (10th Cir. 1995); *Hannula v. City of Lakewood*, 907 F.2d 129, 131 (10th Cir. 1990). The "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Medina*, 252 F.3d at 1128 (*quoting Wilson v. Layne*, 526 U.S. 603, 615 (1999)). The plaintiff must demonstrate that the unlawfulness of the conduct was "apparent" in light of the preexisting law. *Id.* "If the plaintiff fails to satisfy either part of the two-part inquiry, the court must grant the defendant qualified immunity." *Id.* (*citing Albright*, 51 F.3d at 1535).

The Reeves did not meet either aspect of the qualified immunity analysis because the City Respondents' actions did not violate any established constitutional rights *and* were reasonable under the circumstances.

B.

No unreasonable seizure occurred.

Petitioners cite the need for "clarification" of this Court's prior interpretations of Fourth Amendment law, or alternatively, that a "new analytical framework" is necessary under the facts of this case. However, Petitioners wholly fail to cite even one Supreme Court precedent that presents any conflict or inconsistency with the Tenth Circuit and District Court decisions in this matter. To the contrary, those decisions are entirely consistent with well-established principles of Fourth Amendment jurisprudence.

The Fourth Amendment to the United States Constitution provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . " U.S. Const., Amend. IV. Although the Reeves' first claim is that they were subjected to an "unlawful" seizure in violation of the Fourth Amendment, the first step of the two-part inquiry is more accurately articulated as whether the Reeves were subjected to an *unreasonable* seizure. *See Brower v. County of Inyo*, 489 U.S. 593, 599 (1989) (for liability under section 1983, a seizure

alone is not enough, the seizure must also be unreasonable); *see also United States v. King*, 990 F.2d 1552, 1556-57 (10th Cir. 1993). Reasonableness is determined by balancing "the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Brown v. Texas*, 443 U.S. 47, 50 (1979) (*quoting Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977).

It is undisputed that no officer on the date in question entered the Reeves' apartment. *R. 208, 43:3-5; R. 477, 81:7-22.* It is further undisputed that neither Petitioner was subjected to any type of physical restraint. *R. 208, 43:1-2.* They were not told by any officer that they were being detained, or that they were not free to leave the apartment at any time. Indeed, neither woman asked whether they were free to go, whether they were being detained, or stated the desire to leave the apartment.

A "seizure" occurs only when there is a "governmental termination of freedom of movement through means intentionally applied." *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989). A fatal shooting of a fleeing suspect, for example, constitutes a seizure. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). An officer yelling at a fleeing suspect, "Stop, in the name of the law!" does not constitute a seizure if the suspect continues to flee, because a seizure requires either physical force or submission to the assertion of authority. *California v. Hodari D.*, 499 U.S. 621, 626 (1991). This is true regardless of the subject's status as a "suspect" or "non-suspect."

A simple command of "hold it" or "get down on the ground" spoken from outside the apartment, as alleged by the Reeves, is insufficient to establish that a seizure has occurred. This is particularly true where the command was ignored. Ashlee admits that she immediately ran from the room when the alleged command was given. *R. 469, 50:8-11; R. 477, 80:13-19.* Officer Wierman testified in his deposition that the movement he saw within the room was already moving away from him at the time he uttered his command. *R. 338:17-22.* Because the command was ineffective, there was no application of physical force or submission to authority.

Neither Petitioner was detained in this encounter, nor was it reasonable for them to believe they were being detained. Ashlee never even attempted to leave the apartment, instead hiding behind the couch at her mother's direction. *R. 469-70, 51:24-60:2; R. 471, 58:20-25; R. 477, 80:20-81:6.* She never spoke with any officer, and therefore was not prevented from leaving the apartment. *Id.*

Officers Bruno and Housley established that it was their intention to keep any bystanders out of the building hallway for their own safety-their guns were drawn and they were looking for a suspect that could have been armed – and not to detain Alicia Reeves. *R. 289, 63:13-25; R. 394, 42:9-24.* Alicia came and went from her apartment at will, as many as four or five times. *R. 213, 61:14-21.* Each time she left her apartment to demand information from the officers, she claims to have professed fear for her safety, yet

continually placed herself in harm's way. She told the officers that she would not go into her apartment until they told her what was going on, ignoring repeated requests to go back into her apartment, thereby greatly increasing the volatility of her encounters with the officers. She flatly stated to Officer Housley "I am not leaving. I want to know what's going on." *R. 211, 55:20-22.* Alicia's own actions clearly demonstrate that she had no intention of leaving the duplex or of staying in her apartment, and contradict her assertions that she was unconstitutionally detained.

Petitioners have failed to establish that their belief that they were not free to leave was reasonable. The Reeves were not the focus of the officers' presence that day. Neither one was touched by a City Respondent or prevented from leaving the apartment building. No City Respondent threatened either woman with any consequence for failure to comply with their repeated requests. Other than asking where the Bells lived, neither woman was interrogated, investigated, or made to feel that they were the subjects of the officers' attention. Neither Respondent ever asked to leave, or even asked if they were free to leave. Alicia complains that she was "prevented" from ever going outside, but never indicates *how* she was prevented. She makes no allegation that she tried to leave but was affirmatively prevented from doing so. Simply put, the Reeves' words and deeds belie their contention that they were being detained, or that they wanted to leave at all.

As the Tenth Circuit correctly held, under *Hodari D.* and its progeny, the Reeves' failure to submit to the alleged assertions of authority by the City Respondents precludes a finding that they were seized in this matter.

C.

No cause of action for unreasonable search or unlawful entry has been asserted against the City Respondents.

While the Reeves initially asserted a cause of action for unreasonable search and warrantless entry against the City Respondents before the District Court, they abandoned it before the Tenth Circuit, pressing this cause of action only against Churchich. In their Petition for Writ of Certiorari, the Reeves address an "unlawful entry" claim against Churchich only. Therefore, this claim will not be addressed by the City Respondents.

D.

The City officers' actions were objectively reasonable.

Assuming, *arguendo*, that the City Respondents' actions in this matter are held to constitute a violation of the Fourth Amendment, which the City Respondents expressly deny, they are still entitled to qualified immunity. This Court, the Tenth Circuit, and several other circuit courts have established that

the factual circumstances at the time of this incident either did not constitute a seizure, or if a seizure occurred, that it was not objectively unreasonable.

With regard to the display of firearms, taking into account the uncertain and evolving circumstances inherent in attempting to locate and arrest a potentially violent suspect, the officers acted prudently and reasonably. It is clearly-established law in the Tenth Circuit that "[a] law enforcement agent, faced with the possibility of danger, has a right to take reasonable steps to protect himself and an obligation to ensure the safety of innocent bystanders, regardless of whether probable cause to arrest exists." *United States v. Merkley*, 988 F.2d 1062, 1064 (10th Cir. 1993) (*quoting United States v. Alexander*, 907 F.2d 269, 272 (2nd Cir. 1990), *cert. denied*, 498 U.S. 1095 (1991)). Those steps can reasonably include the display of firearms. *Id.*; *accord United States v. Merritt*, 695 F.2d 1263 (10th Cir. 1982), *cert. denied*, 461 U.S. 916 (1983) (*e.g.*, two officers brandishing shotguns to stop suspect believed to be armed).

Officer Jones' alleged pointing of his weapon at Alicia (if it occurred at all) was not unreasonable. Officer Jones was understandably surprised by her presence, and allegedly aimed his weapon only *momentarily* at Alicia. One of the most dangerous situations an officer has to face in the line of duty is that moment when he approaches a dwelling in which he believes a potentially dangerous felon resides. The officer has no way to know who is on the other side of

that door, or who will exit as he approaches, and therefore the utmost caution is warranted.

Without batting an eyelash, Alicia allegedly slapped the gun away angrily, with no apparent consequence for doing so. *R. 207, 37:10-15; R. 211, 54:1-5*. After telling the officers where the Bells lived, she was told to go back to her apartment. This command, or request, depending on how one interprets it, was not followed up by any further use of force or threat of consequence by any City Respondent. Alicia herself testified that she remained on the landing for "what seemed like a long time," and at one point stated emphatically "I am not leaving." *R. 211, 55:20-22; R. 212, 59:8-17*. These are not the actions or statements of a person who reasonably believes she has been seized.

In *Thompson v. City of Lawrence, Kansas*, 58 F.3d 1511, 1514 (10th Cir. 1995), police entered a bail-bonding agency to arrest the operator for solicitation of theft. During the entry of the agency, a customer and her son were shoved to the floor, and an officer drew a firearm on her and handcuffed her. *Id.* at 1517. The officers who entered the bonding agency did not know the customer would be present and were unaware of her relationship to the owner. *Id.* The Tenth Circuit Court held that it was objectively reasonable for the officers to have restrained the customer "given the volatility of the situation." *Id.* "The governmental interest in securing the area around [the suspect] and protecting officers from potential danger is sufficient to justify the temporary

detention of [the customer]," whose relationship to the suspect and possible reaction to the situation were unknown. *Id.* As this Court noted in *Michigan v. Summers*, 452 U.S. 692, 702 (1981), "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation" (concluding that the detention of an occupant of a place to be searched during execution of a search warrant was reasonable).

Qualified immunity is a legal, not a factual issue which must be resolved by the trial court. *Snell v. Tunnell*, 920 F.2d 673, 697 (10th Cir. 1990). Thus, the issue is straight forward: do the facts alleged by the Reeves' support a violation of clearly-established law of which a reasonable police officer would have known? The appropriate answer to that question in this case is "no."

CONCLUSION

The District Court and Tenth Circuit both properly granted summary judgment in the City Respondents' favor, concluding that they were entitled to qualified immunity. Contrary to the Reeves' assertions, they were not detained by any of the City Respondents, and any belief that they were detained was patently unreasonable. The City officers acted reasonably under the circumstances, where the uncertain and evolving events inherent in attempting

to locate and arrest a potentially dangerous suspect required caution, and an obligation to ensure the safety of the innocent occupants of the duplex.

Tenth Circuit and United States Supreme Court case law clearly establish an officer's right to display firearms when faced with the possibility of danger. It further establishes an officer's right, indeed an obligation, to ensure the safety of innocent bystanders under such circumstances. The momentary pointing of a firearm at Alicia Reeves did not rise to the level of a constitutional violation, nor did it reasonably convey to the appellants that they were not free to leave. The alleged swearing at Alicia, while not commendable, was similarly insufficient to constitute a Fourth Amendment violation.

Therefore, the City Respondents respectfully request that this Court DENY the Petition for Writ of Certiorari in this matter.

Dated this 18th day of January, 2008.

Respectfully submitted,

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